IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 49 OF 1996.

Smt.Sunita Umesh Kamat,
residing at 23, Kadambari Bldg.,
U.B.Lane, Ghatkopar (East),
Bombay 400 077. ... Appellant.
(Org.Defendant No.2)

Versus.

1. Mrs.Sundari S.Mendon of Bombay,
carrying on business in the
name and style of M/s.Sundari
& Co. as a Sole Proprietor at
Room No.28, 2nd floor, 123,
Mody Street, Fort, Mumbai-1.

2. Umesh Pandurang Kamat
of Bombay, Indian Inhabitant,
residing at 23, Kadambari,
U.B.Lane, Ghatkopar (East),
Mumbai 400 077. ... Respondents.
(No.1-Org.Plaintiff &
No.2-Org.Defendant No.1)

and

3. M.C.Nathani, since deceased
through his H.L.Rs.
a) Smt.Ritaben Mohanlal Nathani,
b) Deepak Kumar M.Nathani,
aged 14 (Minor) through his
mother and natural guardian
No.3(a).
c) Miss Sharda M.Nathani,
aged 10 (minor), through her
mother and natural gurdian
No.3(a).

All residing at C-8, New Chandrodaya
Housing Society Ltd., Bhanushali ... Respondent
Lane, Opp: Bhanushali Wadi, Tilak (Auction
Road, Ghatkopar (East). Mumbai-87. Purchaser)

Shri R.B.Jaiswal with Ms.R.M.Oza for the Appellant.

Shri M.V.Aiya for the Respondent-purchaser.

None for the Respodents Nos.1 and 2.

CORAM : ABHAY S. OKA, J.

Date on which Judgment is reserved: 2nd May, 2005.

Date on which Judgment is pronouced: 30th June, 2005.

JUDGMENT.:

1. This Appeal from Order is preferred by the original Defendant No.2 by invoking the provisions of Order LXIII Rule 1(j) of the Code of Civil Procedure, 1908 (hereinafter referred to as "the said Code"). The challenge is to the Judgment and order dated 11th/12th December 1995 passed by the learned Judge of the City Civil Court in Notice of Motion No.5420 of 1995 in Summary Suit No.385 of 1987. The Respondent No.1 is the original Plaintiff. The Respondent No.2 is the original Defendant No.1 and the 3rd Respondent is the auction purchaser. In the Notice of Motion which is decided by the impugned Judgment and Order, apart from the prayer made for setting aside the exparte decree, prayer is also made for setting aside order dated 6th October 1994 passed by the Registrar of the City Civil Court under Rule 22 of Order XXI of the said Code. The prayer is for setting aside the order of confirmation of sale dated 27th March 1995 passed by the trial Court of the property of the Appellant in execution of the decree passed by the trial Court in Summary Suit No.385 of 1987. From the affidavit-in-support of the Notice of

Motion it appears that the prayer made of setting aside the order of the sale of immoveable property is by invoking grounds incorporated in Rule 90 of Order XXI of the said Code. The ground is that there was material irregularity or fraud in publishing and conducting the sale of immoveable property of the Appellant.

2. The learned trial Judge by the impugned order held that there was no irregularity in conducting the sale. The learned trial Judge also held that there was a delay in taking out the said Notice of Motion under Rule 90 of Order XXI of the said Code.

3. Before turning to the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case. An exparte decree was passed against the Appellant and the Respondent No.2 in a Summary Suit filed by the Respondent No.1 in the sum of Rs.25,000/-. Initially an application was made for grant of instalment for payment of the decretal amount which came to be rejected. In execution proceedings sale was fixed initially in the year 1990. However, the sale could not proceed as the Respondent No.1 received two post dated cheques for the decretal amount. On 6th October 1994 Notice under Order XXI Rule 22 of the said Code was made absolute by the Registrar of the trial Court. The public auction was held on 24th January 1995 in which the suit flat was

sold in auction. The Respondent No.3 herein i.e. auction purchaser deposited the total sale price of Rs.14 lakhs in the office of the Sheriff of Bombay and the auction sale was confirmed by the learned trial Judge by order dated 27th March 1995. On 28th September 1995, the application of the Auction Purchaser for breaking open the lock on the flat and for possession of the flat was granted by the learned trial Judge.

4. The learned Counsel for the Appellant was very critical of the manner in which the office of the Sheriff had conducted the auction. The learned Counsel appearing for the Appellant has made detailed submissions and has relied upon various precedents. I am referring to only those submissions made by the learned Counsel appearing for the Appellant which are relevant for the purpose of this Appeal. His main contention is that the notice as contemplated by Sub-Rule (2) of Rule 66 of Order XXI of the said Code was not served on the Appellant. His second submission is that the sale could not have taken place until expiration of atleast 15 days from the date on which the copy of the sale proclamation was affixed on the Court house of the learned trial Judge. He pointed out that from the record of the Sheriff it is clear that there is no valid service of notice under Sub-Rule (2) of Rule 66 of Order XXI of the Code and in fact a copy of the proclamation was not at all affixed on the Court house

of the trial Judge. He submitted that in the sale proclamation even the place of auction and the upset price are not mentioned. He submitted that there is no proper valuation made before finalising the sale proclamation and a very valuable property of the Appellant has been sold for comparatively small amount of Rs.14 lakhs. He submitted that a serious prejudice has been caused to the Appellant as the Appellant could not appear before the Court at the stage of finalising the draft of the sale proclamation. He submitted that limitation will start running against the Appellant from the date on which she had knowledge of the fraud or material irregularity. He submitted that on 30th September 1995 the Appellant was served with a copy of the order dated 28th September 1995 passed by the trial Court for breaking open lock on the flat and thereafter the Appellant through an Advocate took search on 4th October 1995. At that time the Appellant for the first time came to know about the proceedings of the sale of the suit flat. He therefore, submitted that the Notice of Motion was taken out in the same month i.e. in October 1995 within the period of 30 days from the date of knowledge of the fraud and/or irregularity.

5. The learned Counsel appearing for the 3rd Respondent/Auction Purchaser submitted that the Appellant has been successfully postponing the sale right from the year 1990. He submitted that notice of

the date for settling the terms of sale proclamation was given to the Judgment-debtor by way of an Order under Rule 54 of Order XXI of the Code and therefore, it was not necessary for the trial Court to serve a fresh notice as contemplated by Sub-Rule (2) of Rule 66 of Order XXI of the said Code. He pointed out that from the year 1995 the entire sale consideration of Rs.14 lakhs is lying with the Sheriff and the said amount is not invested by the Sheriff in Fixed Deposit. He pointed out that the result of failure of the office of the Sheriff to invest the amount is that both the parties have lost a large amount by way of interest. He submitted that the original auction purchaser has in the meanwhile expired. He pointed out that even assuming that there was no service of notice on the Appellant, no prejudice has been caused to the Appellant as the Appellant was fully aware of the proceedings for sale. He submitted that there was no fraud practiced by any one and there was no material irregularity in publication and conduct of the sale. He submitted that the Appellant was all along aware about the auction held on 24th January 1995 and therefore, Notice of Motion taken out in October 1995 was barred by limitation.

7. By way of rejoinder, the learned Counsel for the Appellant placed reliance on the Rule governing the suits on the Original Side of this Court as well as the Rules of the Bombay City Civil Court. He also relied on

the provisions of the Bailiff's Manual published at the instance of this Court.

8. Since serious allegations were made about the manner in which the auction proceedings are conducted, I had directed the representative of the Sheriff to remain present with additional record, if any, which is available in his office and accordingly the representative of the Sheriff was also present on the last date fixed for hearing.

9. Before appreciating the submissions of the Counsel appearing for the parties, it will be necessary to refer to the proceedings of the sale as reflected from the record produced before me. Notice under Order XXI Rule 54 of the Code appears to have been issued on 15th October 1987 which contained an intimation of the date fixed for finalising/settling the terms of proclamation of sale. Attachment was levied on 16th October 1987. It appears that sale proclamation was issued on 28th January 1988 fixing the auction on 20th March 1988. The sale could take place on that day. Therefore, a fresh notice under Order XXI Rule 66(2) of the said Code was issued on 12th August 1988 to the Appellant and the Respondent No.2 informing them that on 5th September 1988 terms of the sale proclamation of sale will be settled. On that date terms could not be settled and the matter was adjourned to 3rd October 1988. On that

date sale was fixed on 29th November 1988 and accordingly proclamation was issued without fixing upset or reserved price. By consent of the parties sale scheduled to be held on 29th November 1988 was postponed. Again a fresh notice under Order XXI Rule 66(2) of the said Code was issued informing the Appellant and the Respondent No.2 that the terms of the proclamation of sale will be settled on 3rd April 1989. Thereafter sale was fixed on 20th June 1989 which was postponed to 17th July 1989. As the Judgment debtor showed his willingness to pay decretal amount, the sale was again postponed till 8th August 1989. Subsequently sale was postponed till 23rd October 1989. As an undertaking was given by the Appellant to pay Rs.10,000/- till 14th November 1989 the sale was again postponed. A fresh notice under Order XXI Rule 66(2) of the said Code was ordered to be issued for settlement of the draft of the sale proclamation which was fixed on 9th October 1990. Again on representation made by the Appellant sale was postponed. From the record it appears that the last meeting was held in the office of the Sheriff on 11th October 1990. The record shows that the auction sale was postponed till 22nd October 1990. The auction sale was further postponed. The further document found in the record is a notice dated 15th November 1994 issued under Order XXI Rule 66(2) of the said Code informing the Judgment-debtor that on 29th November 1994 the terms of proclamation of sale will be

settled at 3.30 p.m. On the reverse of the original Notice dated 15th November 1994 there is an endorsement/report made by the Bailiff. The report discloses that on 23rd November 1994 the Appellant informed him that she was not well. The Bailiff recorded in the report that she refused to sign the acknowledgement of the notice and therefore, he pasted the notice on the suit flat. The record shows that on 29th November 1994 the Judgment-debtor was not present and therefore, after settling the terms of the proclamation of sale, the auction was fixed on 24th January 1995 at 3.00 pm. The Advocate for the decree holder was directed to deposit the necessary amount and it was directed that the notice of the auction should be published in Bombay Samachar and Free Press Journal. On 21st December 1994 the sale proclamation was issued. On the office copy of the said proclamation there is an endorsement presumably of the Bailiff made on 11th January 1995 that the sale proclamation has been affixed on the property, in the High Court and in the Collector's office. There is no endorsement that the sale proclamation was affixed in the Court house of the City Civil Court. There is no independent record available to show that the proclamation of the sale was affixed on the Court house of the City Civil Court. In the original record which was forwarded to this Court copies of the notices published in the newspapers of the auction sale were not available. The representative of

the Sheriff has tendered a copy of the letter dated 21st January 1995 issued by M/s.Ureka Advertising Agency to the Sheriff's office in which it is stated that the advertisement was published in both the newspapers on 19th January 1995. However, a copy of only the notice published in the daily Bombay Samachar was annexed to that letter.

10. I have considered rival submissions. It will be necessary to refer to Rule 90 of Order XXI of the said Code. The Rule contemplates an application for setting aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale. Further requirement of the provision is that even if the ground of irregularity or fraud is established, the sale cannot be set aside unless it is proved that the Applicant has sustained substantial injury by reason of such irregularity or fraud. Sub-Rule (3) of Rule 90 makes it clear that the application cannot be entertained upon any ground which could have been taken up before the date on which the sale proclamation was drawn up.

11. Therefore, in an application under Rule 90 of the Order XXI of the said Code, material irregularity or fraud has to be established only from the stage of finalisation of proclamation of sale. Rule 66 of Order XXI of the Code deals with the proclamation of sale by public auction. Rule 66 reads thus:

66. Proclamation of sales by public auction.- . (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

. (2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible -

. (a) the property to be sold, or where a part of the property would be sufficient to satisfy the decree, such part;

. (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

. (c) any encumbrance to which the property is liable;

. (d) the amount for the recovery of which the sale is ordered; and

. (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

. Provided that where notice of the date for setting the terms of the proclamation has been

given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs;

. Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.

. (3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

. (4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect of any such matters and require him to produce any document in his possession or power relating thereto."

Rule 67 of Order XXI prescribes the mode of making proclamation and provides that the proclamation shall be made and published as nearly as may be in the manner prescribed by Rule 54 (2) of Order XXI. The Rule 54(2) provides that a copy of the proclamation shall be affixed on a conspicuous part of the property and upon a conspicuous part of the Court house and where the property is a land paying the land revenue to the Government, in the office of the Collector of the District in which the property is situate. Rule 68 provides that without the consent in writing of the Judgment Debtor, the sale shall not take place until expiration of atleast 15 days in case of sale of immovable property from the date on which a copy of the proclamation has been affixed on the Court house of the Judge ordering the sale. On a plain reading of sub-rule (2) of Rule 66 of Order XXI, it will be apparent that the sale proclamation can be drawn up only after notice to the decree holder and the Judgment-debtor. As stated earlier, the record shows that the notice under the said provision was issued on 15th November 1994. The question which is to be examined is whether notice is served.

12. The report of the Bailiff from the office of the Sheriff dated 23rd November 1994 records that the Appellant did not accept the notice on the ground she

was sick. He has stated that a copy of the notice was pasted by him on the premises. There is no affidavit of the Bailiff in support of the said report. It was sought to be contended by the auction purchaser that the notice was validly served on the Appellant. A reference will have to be made to the provisions of Order V of the said Code which are admittedly applicable to the proceedings. Rule 17 contemplates that if a Defendant refuses to sign the acknowledgement of the summons, the serving officer shall affix a copy of the summons on the outer door or at some conspicuous part of the house in which the Defendant ordinarily resides and shall return the original summons to the Court with a report endorsed thereon or annexed thereto recording the affixing of the copy of the summons and the circumstance under which he did so. Rule 19 of Order V of the Code is material which reads thus:

> "19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as

it thinks fit."

The said Rule provides that before declaring that the service effected under Rule 17 is valid, the return under Rule 17 has to be verified by an affidavit of the serving officer. The implication of the Rule is that if the return under Rule 17 is not verified by the affidavit of the serving officer it is mandatory for the Court to examine the serving officer on oath before declaring that the summons has been duly served. In the present case the report of the Court Bailiff is not verified by the affidavit of the Bailiff. There is no record to show that the Court Bailiff was examined on oath before accepting the service effected under Rule 17 as a valid service. Therefore, it could not have been declared that the notice has been duly served on the Appellant. In the year 1953, Bailiff's Manual was issued by this Court for the guidance of the Court Bailiffs. The Manual contains various guidelines to be followed by the Bailiffs. From the record of the Sheriff produced in this case, I find that the provisions of the Manual as well as the said Code have been ignored by the Sheriff and by the Bailiffs in his office. The Manual provides that when the summons is served by affixing, the Bailiff should immediately on his return make before the Nazir or any proper officer an affidavit to that effect. In the present case the return/report of the Bailiff of affixing notice by

invoking Rule 17 of the Order V is not verified by an Affidavit. The concerned Bailiff was not examined on oath. Therefore, the service of notice cannot be treated as valid and legal in view of Rule 19 of Order V of the said Code.

13. The object of issuing the notice under sub-rule (2) of Rule 66 is that the Judgment-debtor must get an opportunity to raise objection to the draft of proclamation of sale. The Judgment-debtor can raise several objections such as failure to incorporate up-set price or that the upset price is extremely on lower side.With a view to ensure that competitive price is fetched, the Judgment-debtor can raise an objection to the draft of the proclamation on the ground that material particulars of the property are not incorporated. However, in the present case there is no valid service of the notice on the Appellant-Judgment debtor.

14. Rule 68 of Order 21 of the said Code reads as under:

> "68. Save in the case of property of the kind described in the proviso to rule 43 no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least fifteen

> days in the case of immoveable property, and of at lease seven days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale."

There cannot be any dispute with proviso to Rule 43 will not apply to the property which was sought to be sold. Therefore, without the consent of the judgment-debtor sale could not have been effected until expiration of at least 15 days from the date on which the sale proclamation has been affixed on the Court house of the Judge ordering sale. The original sale proclamation is on the record. The endorsement thereon dated 11th January 1995 presumably made by the Bailiff shows that the proclamation was affixed on the property, in the High Court and on the Collector's notice board. There is nothing to indicate on record of the Sheriff that the sale proclamation was affixed in the Court house of the Judge ordering the sale. In my view the requirements of Sub-Rule (2) of Rule 66 and Rule 68 of Order XXI of the said Code are mandatory. Apart from this, as stated earlier, there is no material on record to show that the proclamation was published in both the newspapers as ordered by the Sheriff. There is nothing to indicate that upset price was fixed.

15. In my view the sale effected without effecting service of notice under Sub-Rule (2) of Rule 66 of Order XXI of the said Code and without complying with the requirement of Rule 68 will be entirely vitiated as the said omissions are obviously material irregularities. The first omission affects the right of the Judgment-debtor to raise objection to the draft of the sale proclamation. On the basis of the proclamation, the valuable property of the Judgment-debtor is to be sold and when she is deprived of the opportunity to appear at the time of finalising the sale proclamation the irregularity has to be treated as material irregularity which causes substantial injury to the Judgment-debtor in view of the decision of the Apex Court reported in (1994) 1 S.C.C. page 131 (Desh Bandhu Gupta v/s. N.L.Anand). In the said decision the Apex court held in paragraph 9 and 10 held thus:

> "9. .....The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor or decree-holder or both the parties. **Service of notice on judgnebt-debtor under Order 21 Rule 66(2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution.** Judgment-debtor should have an opportunity to give his estimate of the property.

The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In Gajadhar Prasad v. Babau Bhakta Ratan this court, after noticing the conflict of judicial opinion among the High Courts, held that a review of the authorities as well as the amendments to Rule 66(2)(e) make it abundantly clear that the court, when stating the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66(2)(e) requires the court to state only nature of the property so that the the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his

own opinion must be stated, i.e. the value of the property, that is, after all, the whole object of Order 21, Rule 66(2)(e), CPC. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66(2)(e). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in sub-rule (2) shall be specified as fairly and accurately as possible. The duty to comply with it arises only after service of the notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremedial inquiry to the judgment-debtor. Equally publication of the

proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66(2) are intended that the prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. **Absence of notice to the judgment-debtor disables him to offer his estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale.** It would be broached from yet another angle. The compulsory sale of immoveable property under Order 21 divests right, title and interest of the judgment-debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment-debtor or the decree-holder. **A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment-debtor of his right, title and interest in his property without an opportunity.** The jurisdiction to sell the property would arise in a court only where the owner is given notice of

the execution for attachment and sale of his property. It is very salutory that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible. In Rajagopala Ayyar v. Ramachandra Ayyar the Full Bench held that a sale without notice under Order 21 Rule 22 is a nullity and is void and that it has got to be set aside. If an application to set aside such a void sale is made it would fall under Section 47.

10. **Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution Court to take further steps to sell his immovable property.** Therefore, notice under Order 21 Rule 66(2), unless proviso is applied (if not already issued under Order 21 Rule 22), and service is mandatory. It is made manifest by Order 21 Rule 54(1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation the judgment-debtor shall be served with a notice before settling the terms of the proclamation of

sale. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment-debtor appears without notice and thereby waives the service of notice."

(Emphasis supplied).

In the present case it is to be noted here that upset price is not mentioned in the proclamation of sale. In view of the law laid down by the Apex Court, it is obvious that the sale is vitiated by material irregularity.

16. Section 17 of the Limitation Act, 1963 provides that where in case of any suit or application for which period of limitation is prescribed by this Act, the suit or application is for relief from the consequences of a mistake or is based on fraud the period of limitation shall not begin to run until the Plaintiff or the Applicant has discovered the fraud or mistake. It is, therefore, necessary to refer to the averments made in support of the application by the Appellant. In paragraph 7 of the affidavit she has stated that she came to know about the sale of the flat and the order of handing over possession of the flat when she was served with the Judgment and Order dated 28th September 1995 on 30th September 1995. It is stated that thereafter she approached her Advocate who took search of the proceedings on 4th October 1995 and found that the suit

flat has been sold. The Notice of Motion is taken out in the month of October itself.

17. The plea that there was material irregularity in effecting service of notice under Sub-Rule (2) of Rule 66 of Order XXI is really a plea on the basis of the mistake on the part of the Sheriff in proceeding with the sale without ensuring that there is proper service of notice. The case of the Appellant is that she noticed the mistake when her Advocate took inspection of the records. From the averments made in paragraph 7 of the affidavit-in-support, it is obvious that if the averments made therein are correct, before 4th October 1995 the Appellant could not have noticed the mistake. Perusal of the affidavit-in-reply filed by the original Plaintiff shows that there is no specific denial of the averments made in paragraph 7 of the affidavit of the Appellant. There is also no specific denial of the said averments made in the affidavit-in-reply filed by the Auction Purchaser. The Advocate for the Auction Purchaser relied upon the notice dated 24th March 1995 addressed by the Deputy Sheriff of Bombay to the Appellant calling upon the Appellant to remain present on 27th March 1995 before the trial Court for confirmation of sale of the suit flat on the basis of the Sheriff's report dated 8th March 1995. On the office copy of the said notice there is a report that the Judgment-debtors were inside the premises but they

refused to open the door and therefore, a copy of the notice was pasted on the premises in presence of one Purushottam who is the Secretary of the Society. The said report is dated 24th March 1995. Again the said report is not verified by an affidavit of the server. The person effecting service is not examined on oath and therefore, it is obvious that the service could not have been treated as a valid service under Rule 19 of Order V of the said Code. The order of sale confirmation was passed on 27th March 1995 which records that the Bailiff was present before the Court who stated that the door of the premises was not opened by the Appellant and therefore, notice was affixed. Again there is nothing on record to show that in compliance with the mandatory requirement of Rule 19 of Order V of the said Code, the Bailiff was examined on oath. There is nothing on record to show that the statement of the Bailiff recorded in the order is a statement made on oath. Considering all these circumstances, it will have to be accepted that till 4th October 1995, the Appellant had no notice of the sale. There is nothing on record to show that before passing the order dated 28th September 1995 of forcible possession any notice was given to the Appellant. I am elaborating all these facts only with a view to ascertain whether the Appellant had knowledge. This is not to say that before passing the order of confirmation of sale, service of the notice on the Appellant was necessary.

18. A grievance is made by the learned Advocate for the Auction Purchaser that the amount deposited by him was not invested. The amount is lying with the office of the Sheriff. It is obvious that as it was not brought to the notice of the trial Court that the amount was lying in the office of the Sheriff, no order of investment was passed. It is desirable that in such cases the office of the Sheriff should bring to the notice of the concerned Court about the amounts lying in the office of the Sheriff so that appropriate orders for investment can be passed. I am also constrained to observe that the office of the Sheriff is under obligation to follow the provisions of Order V of the Code while effecting service of process. The office of the Sheriff cannot overlook the provisions incorporated in the Bailiff's Manual.

19. In view of the above findings, the following order is passed:

(i) The Appeal succeeds and it is accordingly allowed. The auction sale held on 24th January 1995 and the consequent confirmation thereof is quashed and set aside.

(ii) The Auction Purchaser will be at liberty

to withdraw the amount deposited by him with the Sheriff towards sale price, stamp duty and expenses, if any.

(iii) It will be open for the Decree Holder to again apply for sale of the attached property of the Appellant in execution of the decree in accordance with law.

(iv) No order as to costs.

(v) Parties to act on authenticated copy of this order.

Judge.

. At this stage the learned Counsel appearing for the Auction Purchaser prays for stay of this Judgment and Order for a period of 8 weeks. The prayer is opposed by the learned Counsel appearing for the Appellant. Considering the facts and circumstances of the case, for a period fo 8 weeks from today, there will not be a fresh sale of the attached property.

Judge.